No. 91-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MCCORMICK,
Petitioner,

v.

AT & T TECHNOLOGIES, INC., and CAMERON ALLEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition is principally devoted to the proposition that the many federal judges, including the three dissenting judges in this case below, who perceive conflict and confusion in the courts of appeals on two Labor Management Relations Act § 301 preemption questions raised in our *certiorari* petition are unable to read and understand the decisions that appear in the Federal Reporter Second.

Compare Brief for Respondents in Opposition ("Br. Opp.") at 1, 7, 12 (contending that there is no circuit conflict over either the general legal standard for § 301 preemption cases or the application of that standard to intentional infliction of emotional distress tort cases) *with* Pet. App. 14a (the analytic disagreement between the majority and the dissent in this case "reflects a wider inter-circuit conflict on this issue that has developed in recent years as the lower federal courts have sought to apply the Supreme Court precedents."); *Galvez v. Kuhn*, 933 F.2d 773, 775 (1991) (despite "authoritative statements to guide our way [in] . . . *Lingle* [*v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988)] . . . [i]n reality section 301 has been the precipitate of a series of often contradictory decisions. . . ."); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1021 (10th Cir. 1990) ("other circuits have reached varying results when applying the *Allis Chalmers* [*Corp. v. Lueck*, 471 U.S. 202 (1985)] and *Lingle* holding to state tort claims for intentional infliction of emotional distress"); *id.* (referring to the "conflicting results" among the circuits in such preemption cases); *Hanks v. General Motors Corp.*, 906 F.2d 341, 344 n.4 (8th Cir. 1990) ("Inasmuch as the opinion in *Miller v. AT&T Network Services* [850 F.2d 543, 550 (9th Cir. 1988)] . . . would suggest a result different from the one indicated [with regard to intentional infliction of emotional distress tort actions] . . . we disagree.")

Given the inherent implausibiilty of respondents' thesis it is not surprising that it is respondents—*not* the fed-

eral appellate judiciary—who are guilty of misreading and misunderstanding the pertinent court of appeals § 301 preemption cases.

1. First, contrary to respondents' submissions (Br. Opp. at 8-9), there is indubitably a square circuit conflict as to whether § 301 preemption can properly be based on a *defense* that requires interpretation of a labor contract.

To begin at the most obvious point, the Eighth Circuit has repeatedly, explicitly, and squarely held that § 301 preempts state causes of action not only when the plaintiff's case as articulated in the complaint necessarily depends upon construction of the collective bargaining agreement, but also when it is anticipated that there will be a defense raised that will require interpretation of the agreement. *Hanks v. General Motors Corp.*, 859 F. 2d 67, 70 (8th Cir. 1988) (*Hanks I*); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989); *Hanks v. General Motors Corp., supra*, 906 F.2d at 344 (*Hanks II*).[1]

Respondent would blunt the force of these three square holdings by distinguishing *Hanks I* as a case in which there was federal diversity jurisdiction, so that "any employer defenses grounded in section 301 preemption" thereby became pertinent. Br. Opp. at 8 n.2. But nothing in *Hanks I* (or *Hanks II*) indicates that the relevance of

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[1] In so doing, the Eighth Circuit relied upon precisely the passage from *Lingle, supra*, (486 U.S. at 407) that we identified in our *certiorari* petition, and that Judge Phillips noted in his dissent, as the probable source of the confusion in the lower federal courts concerning the claim-centered nature of § 301 preemption. *See* Pet. at 14-16; Pet. App. 24a-25a n.2; *compare Hanks I*, 859 F.2d at 69.

While it is gratifying that respondents agree with us, and with Judge Phillips, that it is "obvious" that this passage could not have been intended to qualify or overrule the explicit holding of *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (Br. Opp. at 11), respondents' concession in a brief is not binding judicial precedent, and consequently cannot alone cure lower court misapprehensions of *Lingle* in this regard. Rather, only a clarification from this Court after plenary review will have that effect.

a defense to determining a § 301 preemption issue turns on whether there is both diversity and federal question jurisdiction or only federal question jurisdiction.[2] And the Eighth Circuit, later, in *Johnson v. Anheuser Busch*, *supra*, both quoted *and* applied its holding that defenses must be considered in determining § 301 preemption to a case that, like this one, plainly did *not* rest on any claim of diversity jurisdiction. 876 F.2d at 623; *id.* at 624 (anticipating that employer and co-workers would defend an intentional infliction of emotional distress cause of action relating to false accusations leading to arrest, prosecution, and discharge on the basis that the "discharge was warranted under the collective bargaining agreement," and finding that "[t]herefore, section 301 preempts this count.")

Additionally, and again contrary to respondents' presentation (Br. Opp. at 8), the First and Ninth Circuits—as well as the Fourth and Eighth Circuits—have relied upon anticipated defenses in determining § 301 preemption questions generally. *Magerer v. John Sexton & Co.*, 912 F.2d 525, 527 (1st Cir. 1990); *Laws v. Calmat*, 852 F.2d 430, 432, 433 (9th Cir. 1988).[3]

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[2] Indeed, the removal in *Hanks* was based on *both* diversity and federal question jurisdiction, and the appellate opinions indicate only that General Motors claimed diversity jurisdiction, not that jurisdiction was indeed proper on that basis. 859 F.2d at 68; 906 F.2d at 342.

[3] Although respondents contend otherwise, the First and Ninth Circuits clearly *have* relied upon proffered defenses in concluding that state causes of action cannot go forward because the ultimate resolution of the case is likely to involve interpretation of the collective bargaining agreement.

The First Circuit, for example, in *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990), held preempted under § 301 a cause of action that, as pleaded, was identical to the retaliatory discharge claim involved in *Lingle*, *supra*. The retaliatory discharge statute in question in *Magerer*, however, permitted a collective bargaining agreement to "waive rights granted by this section." 912 F.2d at 529. *Magerer* held the mere availability of this waiver defense determinative in holding the cause of action entirely preempted by

In contrast, the Sixth and Tenth Cases have emphatically eschewed reliance on anticipated defenses in determining § 301 preemption questions generally. *See O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987).

Thus, respondents proffered distinction of *Hanks* would not, even if accurate, eliminate the deep cleavage in the circuits in this regard.

2. Indeed, that cleavage has been, if anything, deepened by the recent acceptance of a similar distinction by the Seventh Circuit. *Smith v. Colgate Palmolive Co.*, 943 F.2d 764, 770-71 (7th Cir. 1991) (acknowledging that *Caterpillar Inc. v. Williams*, *supra*, establishes a claim-centered principle, but maintaining that it is permissible to "look[] beyond the plaintiffs' complaint to the defenses" in determining whether a state cause of action is substantively precluded).

After *Smith*, it appears that there are now *three* different views among the federal courts of appeal, rather than only two, on the first question presented in our *certiorari* petition, with two circuits holding that defenses never are relevant to § 301 preemption, four circuits holding that such defenses always are relevant, and one circuit maintaining that whether or not such defenses are relevant depends upon whether the question is jurisdictional or substantive.

3. The distinction suggested by respondents and accepted by the Seventh Circuit in *Smith* between § 301

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§ 301, with the result that the plaintiff had no opportunity to litigate whether or not any waiver had in fact occurred and, if not, to go forward on the complaint as pleaded. Similarly, in *Utility Workers v. Southern California Edison*, 852 F.2d 1083, 1086 (9th Cir. 1988) and *Laws v. Calmat*, *supra*, 852 F.2d at 432-33, the Ninth Circuit relied upon a potential contractual waiver defense as the basis for finding preempted causes of action premised upon state constitutional privacy protections and not reliant in any way upon any contractual considerations.

preemption for jurisdictional purposes and § 301 preemption for substantive purposes is, moreover, flatly inconsistent with this Court's cases.

Of the five cases in this Court concerning § 301 preemption of state causes of action, three have arisen in circumstances in which the preemption issue had no jurisdictional consequences. *Allis Chalmers v. Lueck*, *supra* (state court case, not removed); *Lingle*, *supra* (case removed to federal court on the basis of diversity of citizenship and then dismissed on § 301 preemption grounds); *Steelworkers v. Rawson*, —— U.S. ——, 110 S. Ct. 1904 (1990) (state court case, not removed).

The two cases that did decide jurisdictional questions—*Caterpillar, Inc. v. Williams*, *supra*, and *Electrical Workers v. Hechler*, 481 U.S. 851 (1987)—relied directly upon *Allis Chalmers v. Lueck* and did not purport to apply a different preemption standard. *See, e.g., Electrical Workers*, 481 U.S. at 859 (applying "the principle set forth in *Allis Chalmers*" to determine "if respondent's claim is sufficiently independent of the collective bargaining agreement to withstand the preemptive force of § 301"); *Caterpillar*, 481 U.S. at 394-395 (applying standard developed in *Allis Chalmers* and applied in *Electrical Workers*).

As the concordance between these two sets of cases in this Court indicates, there is no basis in § 301 preemption law for respondents' suggestion that there is a different § 301 preemption standard where the issue is "jurisdictional" and where the issue is "substantive."

4. Respondents also maintain that even if there is discord in the circuits on the proper analytic approach to § 301 preemption cases generally, the Fourth Circuit, in deciding whether the various state tort causes of action pleaded by Mr. McCormick are all preempted, did not embrace or apply the proposition that anticipated defenses are pertinent. Br. Opp. 11-12.

The dissenters in this case obviously did not so understand the majority opinion. That is why the dissent de-

voted nearly twenty pages to explaining a "disagreement [that] . . . is fundamental" with the majority's entire mode of preemption analysis. Pet. App. 14a. As that dissent cogently explained, the majority approach does in fact turn preemption of the intentional infliction of emotional distress claim here on the defendants' probable defense, rather than only upon the plaintiff's necessary reliance on the collective bargaining agreement in his affirmative claims:

> The majority . . . essentially finds this claim preempted because . . . its proof necessarily will require proof of "wrongful conduct" by the employer. From this, the reasoning proceeds that inevitably this will require proof of all the circumstances relevant to the conduct's occurrence; that one of the circumstances will be the labor contract between the parties; that this will require interpretation of that contract, and that that does it: the claim is preempted . . . .
>
> The [majority's] analysis of how litigation of this claim in a civil action probably would proceed is likely an accurate one, but . . . it is irrelevant to the much simpler, true preemption issue: whether McCormick's well-pleaded state-law tort claim locates the duty allegedly violated by AT&T in their labor contract or in some source of legal duty independent of that contract. The answer to that issue is plain: in an independent source, Virginia tort law. Specifically, in the duty imposed by that body of law upon all persons, running to society in general and not dependent upon any employment relationships, (1) not to engage in intentional or reckless conduct (2) that is outrageous and intolerable, offending generally accepted standards of decency and (3) that causes (4) severe emotional distress to a plaintiff. . . McCormick's claim obviously does not seek to locate any such duty, either expressly or by necessary implication, in any special obligation imposed on AT&T by it labor contract, as did the preempted claims, for example, in *Lueck*, *Hechler*, and *Rawson*.
>
> The fact that in defending against the claims . . . AT&T may be entitled . . . to rely on provisions of its labor contract to demonstrate that its conduct in con-

> formity with them could not be considered "outrageous" is at this point in the process beside the point. That would be to invoke a federal defense (the labor contract's terms) . . . . [Pet. App. 28a-29a.]

See also id. at 30a-32a (similar analyses of the remaining state tort causes of action).

Moreover, in two cases decided since this one, the Fourth Circuit itself has confirmed, relying on the decision below, that its circuit law does indeed look to defenses to determine § 301 preemption issues. *See White v. National Steel Corp.*, 938 F.2d 474, 483 (4th Cir.), *cert. denied*, —— U.S. ——, 60 L.W. 3375 (1991) (determining that because plaintiffs' claims hinge on oral agreements separate from the collective bargaining agreement and because "National's defenses . . . are not based in a collective bargaining agrement . . . nor must a fact-finder interpret any provisions of a collective agreement in order to determine these issues[, p]laintiffs' asserted rights are, therefore, not preempted by section 301."); *Lepore v. Ramsey*, 1991 U.S. App. Lexis 23211 (4th Cir., Oct. 7, 1991) (emphasis supplied) ("Under the *McCormick* reasoning, it would be necessary in assessing the fault of all of these defendants under these tort claims to interpret the provisions of the collective bargaining agreement that defined their duties to Lepore allegedly violated, *or that gave rise to defenses to those claims.* On that basis, on the authority of *McCormick*, all these claims were properly held preempted. . . .")[4]

Thus, while respondents may not understand the decision below as holding that "an employer's defenses may

[4] *Lepore* is an unpublished opinion. Fourth Circuit rules discourage but do not forbid citation of unpublished opinions within the Fourth Circuit, and do not specify whether such opinions can be cited outside that circuit. I.O.P. 36.5 of the United States Court of Appeals for the Fourth Circuit. For this Court's convenience, we have filed copies of the *Lepore* decision with the Clerk's office. For present purposes, the importance of *Lepore* is not as precedent, but to demonstrate that, unless this case is reviewed and reversed, cases will continue to be decided in the Fourth Circuit on the basis of a § 301 preemption analysis in conflict with that of other circuits.

establish complete preemption under section 301" (Br. Opp. at 7), the Fourth Circuit Judges who participated in the *McCormick* decision certainly do, and are applying that principle to the cases before them.

5. Finally, respondents characterize the courts of appeals opinions on § 301 preemption of intentional infliction of emotional distress claims in particular as harmonious, maintaining that the seemingly conflicting legal standards applied by the various circuits are simply "slight variations in verbal formulas." Br. Opp. at 13-14. But these admitted variations are not, as respondents would have it, simply different ways of saying the same thing; rather, there is a difference of principle. That difference concerns whether such cases of action are preempted, as the Fourth, Fifth, Tenth (and to some extent the Seventh and Ninth Circuits) maintain, merely because the employer can argue that its behavior is not "outrageous" since the actions in question are consistent with the collective bargaining agreement, or whether, instead, as the Third, Sixth and Eighth Circuits hold, that possible contention is not a basis for § 301 preemption. See Pet. 16-23.

Further, as we demonstrated in some detail in our *certiorari* petition, this difference in the governing standards dictates different results in identical cases. Thus, the state tort cause of action in this case could not have been declared preempted under the standards applied in the Third, Sixth, and Eighth Circuits, probably would not have been declared preempted under the Ninth Circuit's most recent cases, and may or may not have been held preempted in the Seventh Circuit. Pet. at 18-19, 21 n.7, 22 n.9, 23.[5]

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[5] Since the *certiorari* petition was filed, the Ninth Circuit has once more held that intentional infliction of emotional distress claims may be preempted or not, depending upon whether the collective bargaining agreement in some specific way addresses the validity of the actions claimed to be tortious. *Milne Employees Association v. Sun Carriers, Inc.*, —— F.2d ——, —— (9th Cir. Nov 20, 1991).

Indeed, conflict in result in indistinguishable cases is not merely hypothetical but has already occurred. For example, the Eighth Circuit in *Hanks I* and *II*, and the Sixth Circuit in *O'Shea v. Detroit News*, *supra*, held not preempted state causes of action for intentional infliction of emotional distress premised upon job assignments alleged to have resulted in severe emotional injury.[6] In both instances, the courts of appeals recognized that the employer's contention that the job assignment was appropriate under the collective bargaining agreement might be relevant in determining the intentional-infliction-of-emotional-distress "outrageous conduct" element, and that the assignment could have been grieved under that agreement. *Hanks II*, 906 F.2d at 344-45; *O'Shea*, 887 F.2d at 686-87; *see also Knafel v. Pepsi-Cola Bottlers*, 899 F.2d 1473, 1476, 1483 (7th Cir. 1990) (finding non-preempted an intentional-infliction-of-emotional-distress cause of action premised in part upon job assignment).

In contrast, the Ninth Circuit in *Miller v. AT&T Network Services*, *supra*, preempted an intentional-infliction-of-emotional-distress claim premised upon a job assignment known to endanger the plaintiff's health on the same theory adopted by the Fourth Circuit here, *viz.*, that the resolution of the "outrageous conduct" element of such causes of action may be influenced by the employer's claim that its action did not violate the collective bargaining agreement. 850 F.2d at 50-51; *see also*, preempting a similar job assignment-related cause of action, *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 239 (9th Cir. 1990); *compare* Pet. App. 10a.[7]

Similarly, the Tenth Circuit in *Johnson v. Beatrice Foods*, *supra*, preempted allegations of name calling,

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[6] Respondent's attempt to find a "recurring pattern" in the facially inconsistent court of appeals intentional infliction of emotional distress/§ 301 preemption cases tellingly leaves out both *Hanks* and *O'Shea*. Br. Opp. at 13.

[7] The Fourth Circuit majority, in this case, expressly relied on *Miller*. *See* Pet. App. 11a.

surveillance, shunning, public ridicule, verbal abuse, harassing job assignments, and other harassing behavior both in and out of the workplace that focussed on the manner of treatment, not its substance. 921 F.2d at 1017-18. See also *Lepore v. Ramsey*, *supra* (intentional infliction of emotional distress claim based on verbal sexual harassment preempted). These allegations are indistinguishable for § 301 preemption purposes from the allegations of harassing behavior underlying the nonpreempted intentional-infliction-of-emotional-distress causes of action in, for example, *Krashna v. Oliver Realty, Inc.*, 895 F.2d 111 (3rd Cir. 1990) (racial insults); *Galvez v. Kuhn*, *supra* (racial slurs); and *Fox v. Parker Hannifan Corp.*, 914 F.2d 795, 802 (7th Cir. 1990) (unspecified harassing behavior in and out of the workplace).

As these examples illustrate, unless this Court grants *certiorari* in this case, the issuance of conflicting court of appeals' decisions such as those we have enumerated above will continue apace.

CONCLUSION

For the reasons stated above and in our Petition for Writ of Certiorari, this Court should grant certiorari in this case and reverse the decision below.

Respectfully submitted,

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